IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOTLZ FARMS, INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN;

RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; MICHAEL E. HOY; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

vs.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

COMBINED RESPONSE BRIEF AND OPENING BRIEF OF APPELLEES/CROSS-APPELLANTS SOUTHERN MONTANA ELECTRIC AND THE URQUHARTS

On appeal from the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW BY CROSS-APPEAL

Appellees/Cross-Appellants present the following issues by cross-appeal:

A. Whether the District Court erred in denying summary judgment to Southern Montana on grounds of mootness by virtue of the sale of the property after rezoning and commencement of construction, without any request for a stay by Appellants; and

B. Whether the District Court erred in concluding, in its analysis of the spot zoning issue, that the rezoning was special legislation.

II. STATEMENT OF FACTS

Appellees/Cross-Appellants Southern Montana Electric Generation and Transmission Cooperative, Inc. (hereinafter, "Southern Montana") and the Estate of Duane L. Urquhart, Mary Urquhart, Scott Urquhart and Linda Urquhart (hereinafter, "Urquharts") disagree with parts of Appellants' (hereinafter, "Plains Grains") Statement of the Case. They therefore provide the following additional facts.

On October 30, 2007, the Urquharts filed their "Application for

Rezoning to Cascade County." (Vol.1, pp.010059-277).[1] The first page of the Urquharts' Application clearly states that the requested rezoning to Heavy Industrial use is a "prerequisite to the planned construction and operation of an electric generating station, known as the Highwood Generating Station." The next sentence states that the Applicants ***intend to sell*** the rezoned property to Southern Montana, which plans to "permit, construct and operate HGS [Highwood Generating Station (hereinafter, "HGS")], a 215-250 mW electrical generating facility." (Vol. 1, p.010062) (emphasis added).

The Urquharts' Application, which consists of 37 pages of text and 33 exhibits, addresses at great length the proposed use and features of HGS. Thus, from the very beginning of the rezoning process, by virtue of the Urquharts' Application itself, it was clear that the sole use contemplated by the rezoning was the industrial use of an electrical generating facility. This refutes Plains Grains' claimed chagrin and surprise at the County's having conditioned the rezoning to heavy industrial use on the sole use of an electrical power plant.

The Urquharts' Application fully and completely sets forth the

[1] The parenthetical reference to Volume and page numbers is to the twelve volume record certified and filed with the Court on two discs. The discs are found at District Court Docket No. 17, which is the *Notice of Filing of the Record of Proceedings*, submitted by Appellee Cascade County.

grounds for the proposed rezoning and is in compliance with Cascade County Zoning Regulation (hereinafter, "C.C.Z.R.") 14.1.1.1 (titled "Application Requirements"). The complete Application was available to the public on the County Planning Department's website beginning November 1, 2007.

The Cascade County Planning Department's initial "Staff Report" to the Cascade County Planning Board is dated November 19, 2007. (Vol. 1 pp.010442-628). The full eighteen page report, including four exhibits from the Urquharts' Application and various other attachments (numbered A through G), was available for review by the public at the County Planning office and on the County Planning Department's website. Staff recommended approving the rezoning in the report. (Vol. 1, p.010444). This recommendation was based on staff's thorough analysis of the rezoning, including staff's conclusions that the rezoning complied with the County's Growth Policy and the ***Lowe v. City of Missoula***, 165 Mont. 38, 525 P.2d 551 (1974) (overruled on other grounds), zoning criteria, discussed below.

In addition to the rezoning, the report also addressed the County Location Conformance Permit (i.e. building permit), and in particular, discussed the following matters pertinent to issuance of the permit:

development of a traffic mitigation plan for Salem Road (Vol. 1, pp.010454; 457); paving Salem Road (Vol. 1, pp.010455; 457); mutual aid agreements (Vol.1, p.010455); state building permits (Vol. 1, p.010455); compliance with all federal, state and local laws, rules and regulations (Vol. 1, p.010456); landscaping design (Vol. 1, p.010456); and lighting design (Vol. 1, p.010456). As the District Court accurately noted in its November 28, 2008 Order, all of the "conditions" that Plains Grains claims to have been surprised about are addressed in the Staff Report (which was available to the public on November 19, 2007). (Appendix Tab 1 (Order), pp.15-19).

Following proper legal notice in the Great Falls Tribune, the Cascade County Planning Board convened a public hearing on December 4, 2007, beginning at 9:00 a.m. (Vol. 1, pp.010415-419). The hearing lasted ***seven and one-half hours***. Prior to the public hearing, Brian Clifton (Cascade County Planning Director) read, for the benefit of the Board and all members of the public in attendance, his complete staff report. (Vol. 11, pp.110021-051). At the public hearing, every person present who desired to speak was given the opportunity to do so. In addition, the Planning Board received written comment from the public on the rezoning, which the County Planning department staff summarized at the end of the hearing. After deliberating, a majority of the Board decided to recommend to the

Commissioners that they approve the rezoning. (Vol. 11, p.110279-280).

Here again, it must be emphasized, in response to Plains Grains' claims they had no knowledge of the conditions of the rezoning and the Location Conformance Permit until the hearing before Commissioners (on January 15, 2008), that a number of the speakers at the Planning Board hearing, including Appellants and the Board itself, addressed matters which were ultimately the subject of the conditions. (***See e.g.***, Planning Bd. Transcript at Vol. 11, p.110145 (***Appellant*** Helen Coleman, increased dust during construction); p.110148 (Richard Dohrman, noise and traffic on Salem Road); pp.110150-157 (Cherie Justo, visual impact on HGS on landscape); p.110171 (***Appellant*** LaLonnie Ward, fire safety); and pp. 110252-257 (Board member Leonard Lundy, fire safety)). That this dialogue took place, in a public forum, where Appellants had every right to participate, and many of whom did in fact participate and either heard or presented testimony about the conditions ultimately adopted by the Commissioners, further defeats their argument that the conditional zoning was somehow flawed because they did not have proper notice of the conditions.

By statute, the Planning Board acts solely in an advisory capacity to the County Commissioners. §76-2-204, M.C.A. It is entirely proper that a

vetting of the issues, so to speak, took place at the first public hearing before the Planning Board. Following the Planning Board hearing, Plains Grains, like Southern Montana and the Urquharts, had every opportunity prior to the Commission hearing set for January 15, 2008, to prepare to respond to these issues. That Plains Grains failed to do so, or did not respond as well as they would have liked, cannot be the basis for reversal of the Commission's legislative act of approving the rezoning.

By letter dated January 9, 2008, from Southern Montana to Cascade County, Southern Montana agreed to eleven conditions relative to the rezoning and the Location Conformance Permit. (Vol. 11, pp.110397-398). The first of the eleven conditions reads: "SME agrees, as a condition of rezoning to heavy industrial use, that such use shall be solely for purposes of an electrical power plant." The other ten conditions are specific to issuance of the Location Conformance Permit and regard the following matters:

- Condition 2: Agreement for fire protection with the City of Great Falls
- Condition 3: Install internal emergency fire suppression system
- Condition 4: Train and staff internal fire response team
- Condition 5: Finalize traffic mitigation plan for Salem Road
- Condition 6: Maintain Salem Road during construction
- Condition 7: Pave Salem Road within one year of substantial completion of construction and provide an irrevocable letter of credit, or other similar financial instrument, for security to pave road.
- Condition 8: Comply with all local, state and federal laws and

regulations

- Condition 9: Finalize mitigation plan to reduce glare
- Condition 10: Finalize mitigation plan to reduce noise.

Upon filing with the County, this letter, like all other written comments received by either the Planning Department or the Commissioners' office, was available to the public at both locations. There are at least sixty Appellants in this litigation, many of whom claim to live on neighboring properties. At any time from receipt of the letter by the County, to the time of hearing, any one of these individuals could have reviewed the record and requested a copy of the letter. Apparently, they failed to do so, to what they now claim is their detriment. In addition, the opponents to the project, which include Plains Grains in this litigation, continued to file objections and other materials relative to the rezoning until, and at the time of, the hearing. They therefore cannot be heard to complain about the January 9, 2008 letter from Southern Montana.

On January 10, 2008, the Cascade County Planning Department issued its "Agenda Action Report," which sets forth a summary of the Planning Board hearing and contains amendments to the original Staff Report, based on the hearing before the Planning Board. As the District Court noted, the Action Agenda report and the Staff Report "articulated fully and completely the 'conditions' and, particularly, the procedures for

adoption and enforcement of them, the LCP [Location Conformance Permit]." (Tab 1, p.21; pp.18-20). The District Court noted, in the same passage, that Appellants submitted the Second Affidavit of Ann Hedges which ***discussed these same conditions in the Staff Report of the advisory Planning Board, which predated the hearing by approximately two months.*** (Tab 1, pp.19-20).

Plains Grains, despite this proof of knowledge of the conditions well prior to the hearing, continues to argue to this Court that they first became aware of the conditions at the January 15, 2008 hearing. (Plains Grains Br. p.11). The letter, however, was responding to the same conditions known for months because they were in the Staff Report and Agenda Action Report on file with the County for public inspection and which Ms. Hedges addressed in her Second Affidavit. The District Court correctly rejected this argument, after hearing the testimony of Cascade County Planning Director Brian Clifton and Cascade County Deputy Clerk Marie Sickels. (Tab 1, pp.15-21).

Following proper legal notice in the Great Falls Tribune, the Cascade County Commissioners convened a meeting on January 15, 2008, beginning at 3:00 p.m. Prior to the public hearing, Brian Clifton (Planning Director) once again read, for the benefit of the County Commissioners and all

members of the public in attendance, the complete January 10, 2008 Agenda Action Report. (Vol. 9, pp.090743-766). The hearing lasted ***eleven and one- half hours***, until 2:30 a.m. Every person present who desired to speak at the hearing was given the opportunity to do so. (Vol. 9, pp.090734-1116). In addition, the Commission properly received and reviewed extensive public comment which was submitted prior to the close of the hearing.

The hearing was inherently fair and impartial. Less than mid-way through the hearing, the Commissioners made the unprecedented decision to delay the remaining testimony of the proponents of the rezoning, and to instead allow the opponents of the project to begin their testimony. (Vol. 9, p.090910). The Commission established a fair procedure, whereby each side was given a certain time to present its case in an alternating sequence, until there were no more speakers on either side. This back and forth, between the proponents' and opponents' testimony, continued throughout the evening and ensured, again, that every person who desired to participate had an equal opportunity to do so. No objection to this process, which was done for the benefit of Appellants, was voiced by anyone.

On January 31, 2008, a majority of the Cascade County Commissioners voted to approve passage of the Resolution of Intention to rezone the Urquharts' property, from agricultural to heavy industrial, subject

to the eleven conditions agreed to by Southern Montana in its January 9, 2008 letter to the Commissioners. (Vol. 11, p.110397-398). Notice of this action was published in the Great Falls Tribune. (Vol. 11, p.110442). No lawful protests to the rezoning were received by the Commission during the statutory protest period.

The Commissioners reconvened on March 11, 2008, to consider passing the final resolution of intent to rezone. (Vol. 12, pp.120294-295). This was likewise approved by a majority of the Commissioners, who voted to finally approve the rezoning subject to the same eleven conditions which were enforced through the Location Conformance Permit process.

Plains Grains appealed the approval by the Commissioners to the District Court on April 10, 2008, exactly thirty days after the final decision of the Commissioners. At no time did Plains Grains request a stay of the approval of the rezoning. Subsequent to the final approval of the rezoning which occurred on March 11, 2008, the property was sold by the Urquharts to Southern Montana on August 25, 2008, and the deeds were recorded August 26, 2008. The deeds were filed with the District Court on August 27, 2008, in support of the Urquharts and Southern Montana's Memorandum in Support of Motion to Dismiss (*see* Dist. Ct. Docket No. 24).

Plains Grains' description of the area rezoned and the surrounding

area, as well as their references to "agricultural use" falling within the A-2 Zoning Classification, are too narrow and not wholly accurate. (Plains Grains Br. pp.1-12). The rezoned property is just east of the City of Great Falls. Within a few miles is Malmstrom Air Force Base, which is visible from the property and which includes its own coal-fired heating plant, large hangars, facilities for storage of nuclear weapons and many large buildings; to the northeast is the MaltEuro malting barley plant with numerous large concrete silos and large buildings; the Great Falls switch yard for electrical transmission switching is just across the Missouri River and is also visible from the property; within a few miles of the rezoned property are five hydroelectric dams on the Missouri River as well as high capacity transmission lines, gas pipelines and related facilities as well as grain silos, elevators, rail lines and other structures.

The Cascade County A-2 Zoning Classification lists ***twelve approved uses,*** which include: agricultural uses; churches; schools; publicly owned buildings; commercial dairies; golf courses; nursing homes; recreational vehicle parks; and day care centers. C.C.Z.R. 7.2.1 - 7.2.1.12 (emphasis added).

The A-2 Zoning Classification also lists ***thirty permitted uses without zone change,*** which include: radio and television towers; cemeteries;

commercial buildings; rock quarries; sand and gravel pits; hospitals; public or private airports; public or private solid waste disposal sites; utility sub-stations; commercial animal operations and feed lots; "***electrical generation facilities;***" and "***utilities both major and minor.***" C.C.Z.R. 7.2.3.1 - 7.2.3.30 (emphasis added).

III. STANDARD OF REVIEW

The standard of review for denial of summary judgment to Southern Montana on the issue of mootness is *de novo*. ***Giambra v. Travelers Indem. Co.***, 2003 MT 289, ¶9, 318 Mont. 73, 78 P.3d 880 ("We review a district court's grant or denial of summary judgment *de novo*. We also review any legal conclusions concerning the grant or denial of summary judgment for correctness.") (citations omitted).

The standard of review advocated by Plains Grains in their Brief (*de novo*) of a grant of rezoning was only partially correct. Plains Grains cited to only a portion of this Court's ruling in ***Citizens for Responsible Dev. v. Bd. of County Commrs. of Sanders County***, 2009 MT 182, 351 Mont. 40, 208 P.3d 876, and omitted mention of the deference accorded the decision of the County Commission. The full and proper standard of review of an appeal of the governing body's decision to approve an application for rezoning or subdivision is:

> We review a district court's grant of summary judgment *de novo*. ***Abraham v. Nelson***, 2002 MT 94, ¶9, 309 Mont. 366, 46 P.3d 628.
>
> Section 76-3-625(2), MCA, authorizes an appeal of a governing body's decision to "approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision" to the district court. The district court must determine if the governing body's decision was arbitrary, capricious, or unlawful. ***Madison River R.V. Ltd. v. Town of Ennis***, 2000 MT 15, ¶30, 298 Mont. 91, 994 P.2d 1098; ***Kiely Constr., LLC v. City Red Lodge***, 2002 MT 241, ¶69, 312 Mont. 52, 57 P.3d 836. "While the standard of review we have adopted utilizes three terms, it breaks down into two basic parts. One part concerns whether the agency action could be held unlawful and the other concerns whether it could be held arbitrary or capricious." ***North Fork Preservation Assn. v. Dept. of State Lands***, 238 Mont. 451, 459, 778 P.2d 862, 867 (1989).

Citizens for Responsible Dev., ¶¶7-8.

In ***Town & Country Foods, Inc. v. City of Bozeman***, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283, the Court used similar language to describe the standard of review for a rezoning case:

> The standard of review in appeals from summary judgment rulings is *de novo*. ***Erler v. Creative Finance & Investments, LLC***, 2009 MT 36, ¶16, 349 Mont. 207, 203 P.3d 744. Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. ***Erler***, ¶16 (citing M.R.Civ.P. 56). We review questions of law to determine whether the district court's legal conclusions are correct. ***Erler***, ¶16.
>
> Section 76-2-227, MCA, authorizes a court reviewing a zoning decision made by a board of adjustment or any officer, department, board, or bureau of the municipality

> to hold a hearing and reverse, affirm, or modify a zoning decision. In Montana, a district court reviews the zoning authority's decision for an abuse of discretion. ***Flathead Citizens v. Flathead County Bd.***, 2008 MT 1, ¶32, 341 Mont. 1, 175 P.3d 282; ***Arkell v. Middle Cottonwood Bd.***, 2007 MT 160, ¶24, 338 Mont. 77, 162 P.3d 856. An abuse of discretion occurs when the information upon which the municipal entity based its decision is so lacking in fact and foundation that it is clearly unreasonable. ***Flathead Citizens***, ¶32; ***North 93 Neighbors, Inc. v. Bd. of Co. Com'rs***, 2006 MT 132, ¶ 44, 332 Mont. 327, 137 P.3d 557 (Quotation omitted).
>
> This Court does not sit as a super-legislature or super-zoning board. ***Englin v. Board of County Com'rs***, 2002 MT 115, ¶16, 310 Mont. 1, 48 P.3d 39; ***Anderson Ins. v. City of Belgrade***, 246 Mont. 112, 120, 803 P.2d 648, 653 (1990). The courts give deference to the decisions of the local board. 83 Am.Jur.2d *Zoning and Planning* § 677 (2003) (citing ***Omnipoint Corp. v. Zoning Hearing Bd. Of Pine Grove, Tp.***, 181 F.3d 403 (3rd Cir. 1999)).

Town & Country Foods, ¶12-14; *see also* ***Schanz v. City of Billings***, 182 Mont. 328, 335, 597 P.2d 67, 71 (1979) (seminal case setting forth standard of review of a rezoning decision, holding that a rezoning ordinance is a legislative enactment entitled to presumptions of validity and reasonableness).

IV. SUMMARY OF ARGUMENT

The District Court granted summary judgment to the Urquharts on mootness and should have granted summary judgment to Southern Montana on the same bases. There are no legal bases on which to differentiate or treat

the parties differently.

The District Court correctly concluded that the Cascade County Commission's decision to grant the application to rezone the property was properly supported factually and legally. The District Court also appropriately deferred to the Commission under the applicable standard of review which grants great deference to the determination of the body vested with the authority to determine local zoning matters.

The District Court correctly determined that the conditions placed on the property were proper and appropriate as part of the duty of the County Commission to ensure proper fire protection, safety and related matters pursuant to the Cascade County Location Conformance Permit process and that the conditions were part of the public record from the outset. Even assuming, *arguendo*, that this was conditional zoning, this Court has approved zoning with conditions on at least two prior occasions as have other courts across the country.

V. ARGUMENT

A. The Failure of Plains Grains to Request a Stay of the Rezoning Decision, Subsequent Sale of the Property, and Commencement of Construction Renders the Appeal Moot.

Did Plains Grains' failure to request a stay of the rezoning decision and the subsequent transfer of the property render the appeal moot? This

issue presents a question of law.

1. Mootness is a threshold issue

This Court has unequivocally held that mootness is a threshold issue which must be resolved prior to addressing the underlying dispute:

> Mootness is a threshold issue which, whether raised by this Court *sua sponte* or by a party, must be resolved prior to addressing an underlying dispute.

In re Marriage of Gorton and Robbins, 2008 MT 123, ¶16, 342 Mont. 537, 182 P.3d 746 (citing ***Povsha***, *infra*).

2. The decisions of this Court are clear and consistent and require dismissal

In 1996, the Supreme Court issued its decision in ***Turner v. Mt. Engr. and Constr., Inc.***, 276 Mont. 55, 915 P.2d 799 (1996). In that decision, the Supreme Court issued a clear warning of the danger of mootness when a party does not seek a stay. The case arose out of a foreclosure action which granted the request to foreclose certain mortgages. The decision was subsequently appealed but the case was rendered moot when the sheriff sold the property to satisfy the outstanding mortgages. The Supreme Court warned about mootness of an appeal where a party has failed to seek a stay of the judgment:

> A party may not claim an exception to the mootness doctrine where the case has become moot through the parties' own failure to seek a stay of the judgment.

Turner, 276 Mont. at 60, 915 P.2d at 803.

Further, the Supreme Court abandoned the prior distinction between voluntary and involuntary payment or performance, where a party has available to it a motion to stay. Where property has changed hands and the Court is no longer in a position to grant effective relief, the appeal is moot and the case must be dismissed.

More recently, the Supreme Court has issued three decisions, two in December 2007 and one in June 2008, reaffirming this doctrine and applying it specifically to appeals to the District Court of challenges to rezoning and subdivision decisions.

In ***Henesh v. Bd. of Commrs. of Gallatin County***, 2007 MT 335, 340 Mont. 239, 173 P.3d 1188, the plaintiff, Penny Henesh, appealed from an Order from the Eighteenth Judicial District Court, Gallatin County, granting summary judgment to the Board of Commissioners and dismissing her complaint that a subdivision approval was unlawful. Henesh did not ask the district court to enter a stay, an injunction or a restraining order. While the action was pending in the district court, the final approval of the subdivision was granted on September 18, 2007, and the lots in the subdivision were sold to a third party. Gallatin County moved to dismiss the appeal, alleging it was moot. The Supreme Court agreed:

> Henesh might have applied for an injunction preventing final approval of the subdivision while the action was pending in the District Court, or an injunction or stay of execution following the District Court's order granting summary judgment to the County entered in June of 2006. If such an application for an injunction had been denied by the District Court, Henesh could have appealed such denial to this Court. Such application could have been made up to September 18, 2007, when the County approved the final plat of the subdivision. She did not. Henesh cannot now be heard to complain because the Estate and the County continued with the process to secure final approval, when she failed to seek available remedies to preserve the *status quo* pending appeal. *See* ***City of Bozeman v. Taylen***, 2007 MT 256, ¶¶28-30, 339 Mont. 274, 170 P.3d 939.
>
> During this litigation, including the appeal, Henesh faced a danger of dismissal for mootness if the property left the hands of the Estate, and thus there was a special need for a stay. The parties cannot now be returned to the status quo because of the transfer of the lots in the subdivision to a third party. This Court can no longer grant effective relief and, as a result, this appeal is now moot. *See* ***Turner v. Mt. Engr. & Constr., Inc.***, 276 Mont. 55, 63, 915 P.2d 799, 804 (1996).

Henesh, ¶¶5-6.

Similarly, in ***Povsha v. City of Billings,*** 2007 MT 353, 340 Mont. 346, 174 P.3d 515, neighbors appealed the approval of a zone change and subdivision approval to allow an auto auction facility to be constructed on the outskirts of Billings, Montana.

The Billings City Council voted to conditionally approve annexation of the property on March 25, 2002, and on May 22, 2002, Povsha filed a complaint in district court seeking to enjoin and set aside the zoning change

and the subdivision approval. After an evidentiary hearing, the district court denied the application for preliminary injunction and Povsha did not appeal the denial. A building permit was issued in June of 2002, and development was completed in the fall of 2002. Povsha subsequently filed a Motion for Summary Judgment challenging the action as illegal spot zoning. The district court ultimately agreed that the planned development was not spot zoning.

Povsha appealed the district court's decision to the Supreme Court. Povsha requested that the Supreme Court reverse the determination of the district court. The Supreme Court dismissed the appeal on the grounds that it was moot. The Supreme Court cited its recent decision in ***Henesh***, *supra,* upon Povsha's failure to appeal the denial of the preliminary injunction, and dismissed the case:

> Povsha could have appealed the trial court's denial of this request for injunctive relief under M.R.App.P. 1(b)(2) but failed to do so. Povsha also could have moved the District Court and then this Court to stay the zoning change and subdivision proceedings in the City and County under M.R.App.P 7, before those proceedings became final. Again, he failed to do so. If this Court cannot restore the parties to their original positions, the appeal becomes moot. Thus, having abdicated the two remedies which would have preserved the status quo pending this Court's final resolution of the merits of his claim on appeal, we are no longer able to grant Povsha effective relief.

Povsha, ¶23 (citations omitted). The Supreme Court relied again on its

earlier decision in ***Turner***, *supra,* in the ***Povsha*** decision. ***Id.***

In the more recent decision, ***Mills v. Alta Vista Ranch, LLC***, 2008 MT 214, 344 Mont. 212, 187 P.3d 627, the Supreme Court reaffirmed the seminal decision of ***Turner***, *supra*, and again warned litigants that the failure to seek a stay is fatal to a district court action seeking a writ of mandamus or judicial review when the property has changed hands:

> We have warned against the "particular danger of dismissal for mootness" where the sale of the property to a third party is involved. ***Turner v. Mountain Engineering and Const., Inc.*** 276 Mont. 55, 63, 915 P.2d 799, 804 (1996) (citing 9 James W. Moore et al., Moore's Federal Practice ¶ 208.03 (2d ed.1994)). In such circumstances, we have recognized that there is a "special need for seeking a stay." ***Turner***, 276 Mont. at 63, 915 P.2d at 804. Mills filed a motion with the District Court for a stay of the writ pending appeal, which the District Court denied. Mills then filed a petition for supervisory control with this Court. At that point, Mills could have also filed a motion for a stay under M.R.App. P. 22(2), but she did not. As a result, after her application for supervisory control was denied, Pegasus conveyed the re-aggregated parcel to a third party. Under these circumstances, it is impossible for this Court to grant effective relief or return the parties to the status quo. ***Turner***, 276 Mont. at 63-64, 915 P.2d at 804-05. Thus, Mills; appeal of the writ of mandamus and order dismissing Pegasus from the case is moot.

Mills, ¶22.

In its latest decision, ***City of Whitefish v. Bd. of County Commrs. of Flathead County***, 2008 MT 436, ¶23, 347 Mont. 490, 199 P.3d 201 (citations omitted), this Court again warned litigants that the failure to seek a

stay may be fatal to a challenge:

> Notably, we chided the applicants in both ***Povsha*** and ***Henesh*** for failing to appeal the district court's denial of the request for injunctive relief or for failing to seek a stay of proceedings until the parties could reach a resolution on the merits. We explained that we could not restore the parties to their original positions once the challenged conduct had occurred.

Plains Grains never moved for a stay of the County's Resolution rezoning the property. Plains Grains knew for years that the rezoning was for the purpose of construction of a generation plant by Southern Montana. They knew for years that the project was to be constructed on the property owned by the Urquharts and that the Urquharts had agreed to sell the property to Southern Montana. These facts are beyond dispute and are in the record before this Court.

Plains Grains was forewarned by the Supreme Court of the particular dangers of an appeal of a rezoning decision being rendered moot by failure to seek a stay and never moved to stay the rezoning of the property. The property changed hands and the project was commenced. The parties cannot be returned to their prior positions nor can any court grant effective relief.

The District Court erred as a matter of law when it refused to grant the motion of Southern Montana for dismissal based upon mootness. While Plains Grains ***never*** moved for a stay, the District Court, *sua sponte,* concluded that to require Plains Grains to post a bond would violate their

Constitutional rights to have their day in court. However, the Constitution does not guarantee a day in court without posting a bond for damages, nor does it subordinate the rights of another private party, Southern Montana, to suffer damage without bond by the multiple appeals of Plains Grains without ever requesting a stay. This Court recognized this in ***Swan Lakers v. Bd. of County Commrs. of Lake County*** (Mont. Sup. Ct. Cause No. DA 07-0619), when it reversed an earlier order which allowed an appeal of a subdivision decision to go forward without a bond:

> Milhouse is correct that a court has a duty to balance the equities and minimize potential damage when granting injunctive relief. Swan Lakers want to maintain the status quo while challenging the subdivision approval, but admit they do not have the resources to post a substantial bond. Milhous, on the other hand, has invested significant sums of money in its project and is undoubtedly suffering substantial losses with every passing day while the injunction remains in effect...Under these circumstances, we are compelled to conclude that it no longer remains equitable to allow the injunction to continue without Swan Lakers being required to post a bond or other security for the payment of costs and damages...

Swan Lakers, (Tab 2, Order pp. 2-3).

Plains Grains never moved for a stay despite knowing that the property was to be sold and that there was a deadline to commence construction under the DEQ Air Permit. The Constitution protects Southern Montana's rights of equal protection, due process and remedies for damages

just as it protects Plains Grains. The ability of Plains Grains to appeal a ruling does not mean that it has the right to stay a judgment without providing an adequate bond. The law of Montana has always provided for protection via a bond if a litigant sought a prejudgment stay or prejudgment attachment. ***See e.g.*** § 27-18-10, M.C.A., *et seq.* (requiring a bond for prejudgment attachments) and § 27-19-101, M.C.A., *et seq. (*requiring a bond for an injunction).

The District Court erred when it held that it would impair a constitutional right of Plains Grains to require a bond. Plains Grains never moved for a stay or attempted to argue for a reasonable bond. Plains Grains did nothing, and in light of the string of cases from this Court warning litigants of the risk of mootness, Plains Grains proceeded with full knowledge of that risk. The failure to request a stay is, therefore, fatal to Plains Grains' challenge of the rezoning.

For these reasons, the appeal should be dismissed.

B. The Grant of the Rezoning Application Did Not Constitute Spot Zoning.

1. Background

The Highwood Generating Station is intended to supply power to over 50,000 Montanans, including the City of Great Falls, businesses within the city of Great Falls and rural cooperatives members starting just east of Great

Falls at approximately Geyser, Montana, which include Fergus Electric, located in Lewistown; Beartooth Electric, located in Red Lodge; Tongue River Electric, located in Ashland; Mid-Yellowstone Electric, located in Hysham; and Yellowstone Valley Electric, located in Huntley.

The need for the Highwood Generating Station power is real and beyond dispute: the rural cooperatives have been notified by the Bonneville Power Administration that due to the growth in the Pacific Northwest and projected short supply of electricity, the excess power previously sold by Bonneville Power Administration to these Montana rural cooperatives will be needed for Bonneville Power Administration's primary territory – the Pacific Northwest. Therefore, the Bonneville Power Administration has advised the Montana rural cooperatives that their contracts will be reduced and eventually eliminated starting in the year 2008. The Highwood Plant will be owned by Montanans and provide power to many thousands of Montanans at a time when Montanans are paying ever increasing rates for electricity and previously Montana-owned generating plants are now owned by foreign corporations. The project will employ local laborers and trades. A project labor agreement has been entered with the local labor council for employment of local union members.

The rezoning was done in accordance with the applicable county

zoning statutes (referenced above) and the applicable county regulations on amendment of zoning districts, found at Section 14 of the C.C.Z.R. Thus, like other lawful county rezoning in this State, the rezoning by Cascade County of the Urquharts' property was simply a matter of the Cascade County Commissioners voting on the Urquharts' application to rezone, following public notice of the filing of the application and an opportunity for the public to review the application and to comment on the rezoning in a public forum, once before the Planning Board, which acts in an advisory capacity to the County Commissioners, and a second time before the County Commissioners, who are the final decision-makers.

Plains Grains errs in attempting to paint a very different picture of this process in their lengthy pleadings and attacks which argue minutiae. The attacks and challenges are not supported by the record or the applicable law.

What is of utmost importance here, and clearly the case based on the voluminous record developed at the county commission level (which consists of over 12,000 pages of documents contained in twelve volumes), is that the rezoning process was inherently fair to the parties and in fact all the participants. After proper legal notice and the County having properly received and made available to the public all written materials received on the rezoning, every person who wished to comment on the rezoning, in

writing or person, was given the opportunity to do so, during public hearings that spanned some ***nineteen hours***. Then, only after taking an additional two weeks' time to carefully study and consider the evidence in the record, the Commissioners voted to approve the rezoning.

In an annexation and rezoning case brought by neighboring property owners and other interested persons against Wal-Mart Stores, presiding Judge Nels Swandal stated one of the fundamental principles that must likewise guide the Court in upholding the challenged rezoning:

> As both counsel recognize, the Court's function is not to independently determine if the Council made the correct decision on the annexation and re-zoning application. The Court must exercise restraint and limit its determination to whether the Council's decision, which is presumed valid, was random, arbitrary, capricious or an abuse of discretion.

Lake County First v. Polson City Council, (Mont. Twentieth Jud. Dist. Ct. Cause No. DV 06-173) (Tab 3 (Order dated Oct. 12, 2007), pp.13-14). The above standard of review is from the seminal case ***Schanz v. City of Billings***, *supra.*

2. <u>Overview of rezoning</u>

Under §§ 76-1-101 through 76-2-228, M.C.A., a duly constituted board of county commissioners, such as the County in this case, is authorized to adopt zoning regulations. The process for rezoning is set forth

in § 76-2-205, M.C.A., as follows:

> A board of county commissioners must publish a notice of a public hearing on the proposed zoning regulation amendment and provide the public an opportunity to be heard at the hearing. M.C.A. § 76-2-205(1) and (2). A board then must review the recommendation from the planning board and make any revisions or amendments it deems proper based on the public comments received. M.C.A. § 76-2-205(3). A board of county commissioners may then pass a resolution of intent to adopt the amendment. M.C.A. § 76-2-205(4). If a board passes a resolution of intent to adopt an amendment to the zoning regulations it must publish notice of the resolution, and provide for a 30-day protest period. M.C.A. § 76-2-205(5). A board must pass a final resolution adopting the amendment unless 40 percent of the landowners within the zoning district protest the amendment within the 30-day protest period. M.C.A. § 76-2-205(6).

North 93 Neighbors, Inc. v. Bd. of County Commrs. of Flathead County, 2006 MT 132, ¶40, 332 Mont. 327, 137 P.3d 557. In addition, the board of county commissioners must make zoning amendments in accordance with the twelve statutory criteria found in M.C.A. § 76-2-203. ***Id.***, ¶42.

The Cascade County Zoning Regulations which were adopted on April 26, 2005 and amended on October 23, 2007, also apply to the rezoning. Industrial zoning is covered in C.C.Z.R. 7.4. The process for amendment to a zoning designation is set forth in C.C.Z.R. 14 and is the same as the statutory process. Most of the property in Cascade County is zoned agricultural. ***See*** C.C.Z.R. 4 (all county land zoned agricultural

except for incorporated cities and towns and limited zoning districts). Consequently, rezoning out of agricultural to another use, as approved by the County in the present case, is necessary to accommodate growth in the county outside city limits and the limited zoning districts.

The need to accommodate growth which occurs at the edges of a city was expressly recognized by the district court in ***Povsha,*** ¶16: "The court concluded that this zoning change was part of a gradual and pervasive transition from agricultural use to entry-way commercial use..."

3. The district court correctly found that the rezoning did not constitute spot zoning

The Cascade County Zoning Regulation on spot zoning, § 2.99.184 (2007), is derived from the decision of the Supreme Court in ***Little v. Bd. of County Commrs. of Flathead County***, 193 Mont. 334, 631 P.2d 1282 (1981). The criteria for spot zoning are:

1. Whether the requested use is significantly different from the prevailing use in the area;

2. Whether the area in which the requested use is to apply is small, although not solely in physical size, an important factor being how many separate landowners benefit from the zone classification; and

3. Whether the rezoning in more in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public.

The decision by the Cascade County Commissioners was based upon a voluminous record and a careful study by planning staff. Rezoning decisions are not to be based upon "emotional outbursts on the part of individual homeowners" and the decision is not governed by emotional appeals that the value of neighboring property may decrease. ***Lowe v. City of Missoula,*** 165 Mont 38, 46, 525 P.2d 551, 555 (1974).

The District Court correctly concluded that the rezoning did not constitute spot zoning, based upon the allowance of electrical generating facilities with special permit in an area zoned A-2. "Thus, while the coal fired plant will be a different use than agricultural, it certainly was already permissible in that agricultural area prior to the rezoning request. Thus spot zoning is not implicated in this case." (Tab 1, p.25).

Plains Grains argues in its brief that this is erroneous because the use in the area is "unarguably agricultural." (Plains Grain Br. p.22). First, this is patently false based upon the evidence in the record---within a short distance is Malmstrom Air Force base with its large hangers and its own coal fired generating plant, five hydroelectric dams, high voltage transmission lines and transmission switchyard, rail lines and a malting barley plan with many large concrete silos and large buildings. Second, Plains Grains ignores the fact that A-2 is a much broader zoning class than just grain farming---it

includes many allowed uses and permitted uses that are commercial and industrial.

The few instances where the Supreme Court has found spot zoning have been instances where a proposed commercial industrial use would be located in the heart of a traditionally residential neighborhood or in a pristine area. Neither of those circumstances is present in this case. More importantly, there has been no case from the Montana Supreme Court involving rezoning in a rural area, on ground that was zoned A-2 (A-2 zoning is much broader than just agricultural use), where the court found spot zoning. Further, the few cases which found spot zoning involved a small piece of ground and none of the cases where spot zoning have been found have involved a piece of ground as large as this one – 668 acres.

With respect to this project, the record before the Commission confirmed that there are only seven residences within a three mile circle around the proposed site. Some of those residences are closer to Malmstrom Air Force Base, which has its own coal fired heating plant, and other installations which are commercial or industrial in nature.

The concept of spot zoning was first addressed by the Supreme Court in ***State v. Langhor***, 160 Mont. 351, 502 P.2d 1144 (1972), which involved the rezoning of the east half of two city lots, surrounded by residential

homes, to allow a motor repair business. The parcel to be rezoned was very small, it was owned by a single owner, and its use was very different than the immediately surrounding, exclusively residential neighborhood.

The next case to address spot zoning was ***Lowe***, *supra*. Again, this case involved the rezoning of a small piece of land (5.8 acres) and the nature of the dispute involved the density of the residential homes to be constructed. The piece was owned by a single owner, was very small and the use was distinctly different than the surrounding area.

The next case of significance is ***Little***, *supra*, the case which gave rise to the Cascade County spot zoning regulation. The ***Little*** case involved a very small piece of ground on which the developers sought to place a commercial development – a shopping mall – which would be surrounded by residential property. The Supreme Court specifically noted that the surrounding area was 99 percent residential.

The most recent decision from the Supreme Court is ***North 93 Neighbors***, *supra*. In rejecting the challenge to zoning on the basis of the spot zoning argument, the Supreme Court specifically noted that a zone change for property owned by one person is not automatically spot zoning. The Supreme Court also noted that while a Board of Commissioners must honor its growth policy, strict adherence is not possible. In this case, the

detailed analysis by the planning staff found that the Rezoning Application substantially complied with the Growth Policy.

The Court also noted that the presence of certain commercial businesses already in the area and the fact that the present zoning classification allowed certain commercial activity were important factors. The same is true here. The Cascade County Zoning Classification A-2 allows thirteen uses – twelve of which are not agricultural. These allowed uses include schools, colleges, commercial dairies, campgrounds and recreational vehicle parks, and other commercial uses such as a country club, bed and breakfast, nursing home and daycare center. In addition, the A-2 Zoning Classification allows for 30 permitted uses on issuance of a special permit which include a solid waste disposal site, commercial hog barn, airport, utility substation, and, **most importantly, an electrical generation facility and utilities, major and minor.**

Plains Grains raises a red herring in its brief when it contends that only a wind electrical generating facility may be specially permitted in A-2. (Plains Grains Br. pp.15-18). Its argument is unsupported by the County's zoning regulations, and is a misstatement of the classification. Plains Grains' entire argument on this point is based upon its faulty reading of the classification which fails to note that it reads consecutively: "Commercial

Wind Farms/Electrical Generation Facilities..." C.C.Z.R. 7.2.3.16. The two are not tied together. Further, the A-2 classification also permits "utilities both major and minor," which Plains Grains fails to acknowledge in its brief. C.C.Z.R. 7.2.3.24. It is also worth noting that, in addition to the electrical generating facility, Southern Montana planned to also construct wind turbines on site as part of HGS.

Therefore, the District Court correctly concluded that: 1.) rezoning was not technically necessary—the plant could be built without rezoning with a special use permit; and 2.) the proposed use was not materially different than what could be permitted without a zoning change. (Tab 1, Conclusions 10, 11, 12 and 16, pp. 24-27).

The zone change does not represent a significantly different use from that allowed in the area and the uses within a few miles of the site. Therefore, the first criteria originally set forth in ***Little***, *supra,* was not violated by the decision of the Board of Commissioners.

The area in question is not small. ***It is many times larger than any parcel previously found by the Supreme Court to constitute spot zoning.*** It is not a small island surrounded by residential area. Therefore, the second ***Little*** factor was not violated.

The rezoning was not "special legislation designed to benefit one or a

few landowners." The generating plant will be owned by four rural utilities. These rural utilities are cooperatives – in other words they are member owned. Therefore, there will be approximately 50,000 owners of this project since all members of the cooperatives are owners. Further, the generating plant will benefit 50,000 or more Montanans. It is the only project planned that will deliver power to Montanans, rather than being sent out of state, and which will be owned by Montanans.

In ***Boland v. City of Great Falls***, 275 Mont. 128, 910 P.2d 890 (1996) this Court directly addressed the "benefit" or "special legislation" factor from ***Little*** and ruled against the narrow interpretation advocated by Plains Grains:

> We determine that the ***plaintiffs' viewpoint is too narrow***...the Property would address the community's housing shortage, as well as provide a positive economic benefit to the community as a whole. The economic benefit extends not only to the developer but also to the Sisters, the construction companies and local labor force, the potential condominium purchasers, and the local taxing authorities. While the rezoning ordinance applies to a four square block area, the Commission examined a number of factors and determined that the rezoning benefits both directly and indirectly a significant number of landowners and has a substantial bearing on the general welfare of the community. Rezoning the Property to allow for the housing development is a ***reasonable exercise of the City's legislative authority.***

Boland, 275 Mont. at 134-35, 910 P.2d at 894-95 (emphasis added).

The Cascade County Commission considered all of these benefits as well. The record confirms that the community, local labor pool, and thousands of Montanans will benefit from a Montanan-owned power facility. This Court should again defer to the decision of the local legislative body which is well supported in the record.

Plains Grains raises another red herring when it references the National Historic Landmark in its brief. (Plains Grains Br. pp.2,7,26). The landmark is subject to federal agency review and is not a county matter. The landmark in this area is on private property. Plains Grains and all others would be trespassing if they imply that they are entitled to go on the landmark in the area of the HGS (with the exception of public right of ways and the turn-out off Salem Road dedicated to the landmark). The owners of the property are entitled to seek delisting. Further, a portion of the landmark was delisted due to the development associated with Malmstrom Air Base and other facilities. Much of Great Falls is built upon the trail of Lewis and Clark. Recently, the Great Falls Central School and gym were built on the landmark, south of town. Finally, Plains Grains asserted that 200 acres of the subject property is within the landmark, but failed to inform this Court that ***none of the proposed electrical plant will be located within the landmark.***

Perfection in rezoning is not the standard. Just as the decision of the Commissioners, ***acting in a legislative role***, is afforded great deference, the Commission is not held to a standard of perfection and absolute compliance with each point of a growth plan.

> Surely, not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. To impose such a requirement would remove flexibility from a city's review of zoning proposals to and make growth policies a rigid regulation, even exceeding the standard of 'substantial compliance.'

Citizen Advocates for a Livable Missoula, Inc. v. City Council of Missoula, 2006 MT 47, ¶30, 331 Mont. 269, 130 P.3d 1259.

Plains Grains failed to establish each element of the ***Little*** test. The rezoning decision by the Board of Commissioners does not constitute illegal spot zoning. The District Court properly deferred to the factual determinations of the County Commission and correctly analyzed the law. The Supreme Court has rarely found spot zoning, and never found spot zoning in a case even remotely similar to this case.

C. Zoning with Conditions for Issuance of the Location Conformance Permit was Proper.

Plains Grains, consistent with their shotgun approach, also challenge the decision by the Commissioners as being illegal since conditions were placed upon the rezoning.

First and foremost, the District Court found that all but one of the conditions imposed on the property by Cascade County related to the Location Conformance Permit, not to rezoning. The District Court so concluded:

> Plaintiffs next contend that testimony and documentation regarding each of these areas... were not available to the public, the Planning Department or the Board. This misconstrues the nature of a public hearing and, particularly, the LCP process. Such evidence and testimony is exactly the purpose of hearings. The Staff Report/Agenda Action Report language makes clear the issues which must be addressed with regard to noise, fire prevention, glare, etc. They were not a surprise to the Plaintiffs. They make clear the old saying that the "devil is in the detail". It is important to note again, with regard to that detail, that every "condition" but one related to the location conformance permit.

(Tab 1, p.20) (emphasis in original).

Plains Grains does not represent accurately the process by which the conditions were placed on the project. The Cascade County Planning staff did a thorough and detailed analysis of the Application and recommended approval. When their recommendation was transmitted to the Commissioners, the Commissioners directed the Planning staff to request that the developer agree to certain conditions to further minimize impact of the project.

Plains Grains' argument that it was surprised by the conditions was

also properly rejected by the District Court after its careful review of the record. (Tab 1, pp. 15-21). The record proves that Plains Grains was in fact aware of each of the conditions which were fully and completely recited in both the Staff Report and the Agenda Action Report, both of which well predated the hearing before the County Commission and were also posted on the County website and on file for public inspection. The Southern Montana letter of January 9, 2008 was also submitted to the County before the hearing of January 15, 2008 and available for public inspection. It merely agreed to each of the conditions contained in the Staff Report and in the Agenda Action Report. There was no surprise about the conditions.

And finally, as the District Court noted: What is the purpose of a hearing other than to present evidence? ***"Such evidence and testimony is exactly the purpose of hearings."*** (Tab 1, p.20) (emphasis added). Southern Montana, of course, presented evidence that it would meet each condition that was well known to all well in advance of the hearing.

The District Court correctly found that the eleven conditions and Southern Montana's commitment to meet them were the ***"procedure and the hammer of enforcement...This Court's fundamental holding is that the SME letter/conditions were mere reiterations of the Planning Board's LCP requirements as outlined above."*** (Tab 1, p.21) (emphasis added

(bolding only)).

The District Court reached this conclusion based upon the testimony of Brian Clifton, Planning Director, at the evidentiary hearing held on November 26, 2008. (Tab 4 (Excerpt of Transcript)). This was an "emergency hearing" for the Court to do "a little bit of fact finding," which was necessary because Plains Grains would not stipulate that these documents were in a large pile of records available for inspection by the public at the office of the Clerk and Recorder. As the Court will note, the testimony of Mr. Clifton and Ms. Sickels was undisputed and the District Court properly relied upon it in its Order. (Tab 1, p.19).

While Plains Grains cries "foul," the Supreme Court has expressly approved the process as have other courts and commentators. Zoning with conditions has been favorably commented upon by authors of treatises and other courts. For example, the North Carolina Supreme Court noted:

> It is indeed generally agreed among commentators that, because it permits a given local authority greater flexibility and balancing conflicting demands, the practice of conditional use of zoning is exceedingly valuable.

Chrismon v. Guilford County, 322 N.C. 611, 618, 370 S.E.2.d 579, 584 (1988) (*citing* 1 A. Rathkopf and D. Rathkopf, ***The Law of Zoning and Planning*** §27.05 (4th ed. 1987); 2 R. Anderson, ***American Law of Zoning***

§§ 9.17, §9.20 (3rd ed. 1986)). The ***Chrismon*** court noted that where the governmental body imposes the conditions, it is exercising its authority to control use of land and has not abandoned that authority. ***Chrismon***, 322 N.C. at 636, 370 S.E.2d at 594.

In a case arising out of Great Falls, the Supreme Court approved the grant of rezoning which also places conditions upon the developer. In ***Boland***, *supra*, neighbors in a single family residential area protested the grant of a zoning change to allow high density townhouses and condominiums in a neighborhood completely surrounded by single family homes. The piece of ground involved was very small. The protesting neighbors were concerned about increased traffic, off street parking and other problems associated with high density homes in a small area surrounded by a single family residential area. The City granted the rezoning request. The District Court upheld it and it was affirmed on appeal by the Supreme Court.

The City of Great Falls placed certain conditions on the rezoning that were meant to minimize traffic by restricting off street parking, restricting the number of entrances and exits into the high density development and other conditions. The property was rezoned from A – the most restrictive residential designation to C – which was the most high density zoning for

residential areas.

Applying the ***Little*** test, this Court found that this was not spot zoning. Just as importantly, the City of Great Falls placed conditions on the developer in granting the rezoning. The conditions are set forth in the District Court Order attached hereto at Tab 5.[2] The conditions are listed on page 7 of the Order. The District Court favorably considered the City Commission's use of conditions to alleviate concerns of the protesting neighbors.

> Finally, the Commission has taken steps within the zoning contract to regulate and restrict the development in certain areas to prevent over crowding, traffic congestion, parking problems and junk type structure problems.

(Tab 5, p.11).

The Supreme Court also approved rezoning with conditions in ***Citizen Advocates for a Livable Missoula***, *supra*. As noted in that case, certain city council members had concerns with aspects of the proposed project.

> Consequently, the city council rejected the planning board's recommendation for unconditional approval and, instead, requested that OPG ***recommend conditions of approval*** which would amend the zoning proposal to address the council's concerns. After further OPG

[2] The District Court Order had to be retrieved from microfilm; this is the reason it is somewhat difficult to read.

> consideration, that office recommended the placement of 17 conditions on SPH's proposal. ***Those conditions responded to many of the concerns expressed by the public….***

Citizen Advocates for a Livable Missoula, ¶¶11-12 (emphasis added).

The District Court in this case called it accurately when it stated: ***"What zoning worth its salt would proceed without consideration of fire, glare, noise, traffic etc.? These 'conditions' were in fact responses to considerations specifically required by the CCZR through the LCP process. While those CCZR may not allow for 'conditional zoning' in the Plaintiffs words, they certainly require consideration of each and every factor addressed through the LCP process."*** (Tab 1, p.21) (emphasis added (bolding only)).

Plains Grains cannot point to a single decision from the Supreme Court of Montana that has criticized zoning with conditions. Rather, on the only two occasions in reported decisions where zoning with conditions were used, the Supreme Court has noted that those conditions were intended to benefit the general public as well as the protestants.

D. The Commissioners Did Not Violate the Public's Right to Participate.

As discussed herein and as found by the District Court, the process followed by the Commissioners allowed for proper notice and full and fair

participation by all. Thus, there was no violation of the public's right to know and therefore no corresponding violation of the right to participate. (Tab 1, pp.15-19).

Without rehashing what has been stated previously, it is worth summarily pointing out that the conditions ultimately adopted by the Commissioners were addressed in the Application itself; they were discussed at length in County's Staff Report; they were the subject of comment by the public and the Board at the Planning Board hearing; and they were analyzed (for a second time) in the County's Agenda Action Report which issued prior to the public hearing before the Commissioners. Perhaps most telling is the fact that Ms. Hedges acknowledged in her Second Affidavit the Staff Report and Agenda Action Report, both of which discussed the conditions about which Plains Grains complain. The District Court commented on this in its Order, finding Plains Grains' claims regarding the Staff Report "most curious." (Tab 1, p.19).

In order to avoid duplication of briefing, Southern Montana and the Urquharts represent that they agree with and adopt the analysis of this issue in the brief filed by Cascade County.

VI. CONCLUSION

Southern Montana and the Urquharts respectfully request the Court to

dismiss the appeal on grounds of mootness. Alternatively, Southern Montana and the Urquharts request the Court to conclude the rezoning was lawful.

DATED this 10 day of September, 2009.

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 10,000 words, excluding certificate of service and certificate of compliance.

DATED this 10 day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

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